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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. ROBERTO SALDANA, JR., Defendant and Appellant.	F076842 (Tulare Super. Ct. No. PCF331992A) **OPINION**

APPEAL from a judgment of the Superior Court of Tulare County. Gary L. Paden and Michael B. Sheltzer, Judges.*

Sylvia W. Beckham, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Daniel B. Bernstein and Stephanie A. Mitchell, Deputy Attorneys General, for Plaintiff and Respondent.

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* Judge Paden issued the ruling on the motion to consolidate; Judge Sheltzer presided over the trial and the sentencing hearing.

Robert Saldana, Jr. (appellant), was convicted by jury of second degree murder, attempted murder, conspiracy to commit home invasion robbery, attempted home invasion robbery, being a felon in possession of a firearm, and possession of ammunition, along with various firearm and gang enhancements, arising from three separate cases consolidated for trial. He was sentenced to a prison term of 56 years to life.

On appeal, appellant contends the trial court prejudicially erred when it consolidated the three cases, that the conspiracy convictions must be reversed due to ineffective assistance of counsel, and that the gang enhancement attached to the second degree murder conviction must be reversed for insufficient evidence. We affirm.[1]

STATEMENT OF THE CASE

The trial court consolidated three separate cases arising out of events in three separate years, charging appellant as follows[2]:

The July 20, 2008 murder of Martin Ibarra

Count 1: murder committed while an active participant in a criminal street gang (Pen. Code, §§ 186, subd. (a); 190.2, subd. (a)(22));[3] that appellant personally used a deadly weapon (knife) during the commission of the crime (§ 12022, subd. (b)(1)); and that the crime was committed for the benefit of a criminal street gang (§ 186.22, subd. (b)(1)(C)).

The August 24 and 25, 2015 conspiracy to commit home invasion robbery

Counts 5 and 7: conspiracy to commit home invasion robbery (§ 182, subd. (a)(1)); and that the crimes were committed for the benefit of a criminal street gang (§ 186.22, subd. (b)(1)).

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[1] Respondent contends that there are various mistakes in the abstract of judgment. We address this issue separately and will remand to the superior court for correction.

[2] In chronological order for purposes of clarity.

[3] All further statutory references are to the Penal Code, unless stated otherwise.

Count 6: criminal street gang conspiracy to commit home invasion robbery (§ 182.5).

Count 8: attempted home invasion robbery (§§ 664/211); and that the crime was committed for the benefit of a criminal street gang (§ 186.22, subd. (b)(1)).

Count 9: felon in possession of a firearm (§ 29800, subd. (a)(1)); and that the crime was committed for the benefit of a criminal street gang (§ 186.22, subd. (b)(1)).

Count 10: possession of ammunition (§ 30305, subd. (a)(1)); and that the crime was committed for the benefit of a criminal street gang (§ 186.22, subd. (b)(1)).

The July 27, 2016, attempted murder of Christopher Martinez

Count 2: attempted willful, deliberate, and premeditated murder (§§ 664, subd. (a)/187, subd. (a)); that appellant personally used a deadly weapon (sharp object) during the commission of the crime (§ 12022, subd. (b)(1)); that he personally inflicted great bodily injury (§ 12022.7, subd. (a)); and that the crime was committed for the benefit of a criminal street gang (§ 186.22, subd. (b)(1)(C)).

Count 3: criminal street gang conspiracy to commit murder (§ 182.5).

Count 4: assault with a deadly weapon (§ 245, subd. (a)(1)); that appellant personally inflicted great bodily injury (§ 12022.7, subd. (a)); and that the crime was committed for the benefit of a criminal street gang (§ 186.22, subd. (b)(1) C)).

Following the prosecution's case-in-chief, the trial court granted appellant's motion to dismiss count 7, based on a lack of evidence of two separate conspiracies, and amended "count 5 to allege conspiracies for location one and two." A jury found appellant guilty in count 1 of the lesser offense of second degree murder, and the weapon-use and gang enhancements true. Appellant was found guilty on the remaining counts and enhancement allegations.

The trial court sentenced appellant to a total unstayed prison term of 56 years to life, as follows: on count 1 (second degree murder) to 15 years to life, plus one year on the knife enhancement; on count 3 (criminal street gang conspiracy to commit murder) to

a consecutive term of 25 years to life; and on count 5 (conspiracy to commit home invasion robbery) to a consecutive term of 15 years to life. The trial court imposed and stayed appellant's sentences on the remaining counts and allegations pursuant to section 654.

STATEMENT OF THE FACTS

The Norteño Criminal Street Gang in Tulare County

A gang expert, Officer John Moreno, testified for the prosecution that Lindsay North Side (LNS) is a Norteño criminal street gang that is primarily located within the city of Lindsay. While the number of LNS gang members was fluid, it was thought to be between 50 and 75 at the time of trial. The North Side Lindsay (NSL) gang and LNS gang were "interchangeable" and, at the time of the murder, LNS was an active gang in Lindsay. Norteños and Northerners are part of the Nuestra Familia prison gang, a very structured organization. The Sureños are the primary rival of the Norteños, and "scrap" is a derogatory term for a Sureño.

The expert testified that the primary activities of the LNS include, but are not limited to, murder, attempted murder, arson, drug trafficking, extortion, vandalism, drive-by shootings, assault with deadly weapons, assaults, and intimidation of victims and witnesses.

The expert related details of two predicate offenses committed by NSL gang members in August of 2004 and March of 2005.

The expert opined, based on appellant's prior contacts with law enforcement, association with other gang members, commission of gang-related crimes, wearing gang-related clothing, and self-admission, that appellant "is and was an active LNS Norteño member." Over the course of trial, others identified appellant as an LNS gang member as well. Appellant's moniker or nickname was "Grinch."

2008 Murder of Martin Ibarra (Count 1)

In July 2008, Jose Flores, Jr., Phillip Peyron, and appellant worked together at Tulare Frozen Foods in Lindsay. Around 2:00 a.m. on July 20, Flores, Peyron, appellant, and Ramon "Shorty" Torres were in Flores's apartment, drinking and doing drugs. Neither Flores nor Peyron had hung out with appellant prior to that night.

At the time, Flores was an active Norteño gang member and a lieutenant in the gang. Peyron had been affiliated with the Northerners when he was younger but was not an active gang member at the time. Flores testified that appellant was a Northerner.

At some point, Flores went out onto his balcony and saw a "[y]oung kid," later identified as Martin Ibarra, walking down the street. Flores described the person as "harmless." Flores testified that Ibarra was looking into people's cars "to come up with change" to "support his habit." Flores had seen Ibarra do this previously. Flores went inside to get another beer as appellant and Torres walked onto the balcony. Flores then heard appellant say someone was breaking into his car; Flores went onto the balcony and appellant and Torres ran out of the apartment. Flores and Peyron then also left the apartment and went outside.

Flores heard appellant yell that Ibarra was a "[f**]king scrap," and that the two had had a prior "confrontation." Flores had heard that there were Southerners in the area, but he did not know them.

Appellant put his arm around Ibarra's neck and Ibarra yelled that he was not a Southerner and screamed for help. Flores told appellant Ibarra was not a Southerner and tried to stop him. But appellant continued to hold Ibarra around the neck and then stabbed him twice with a large kitchen knife from Flores's apartment. Ibarra fell to the ground, bleeding and asking for help, but appellant ran toward the apartment.

Flores, who was on parole and had two previous strikes, did not call the police or call for an ambulance. Instead, he said he was "focused" on trying to get the knife back from appellant but could not find him. Flores yelled at Peyron to get rid of the block of

knives that were in the kitchen. Peyron grabbed the block of knives and Flores's girlfriend put the block in a backpack. Peyron took the backpack and walked home.

Flores testified that a killing by a gang member is supposed to be "authorized," but "some people just take it upon themselves to do it." According to Flores, this killing was not authorized, but appellant "just did this all by himself."

Officers found Ibarra lying dead in the gutter. A backpack containing a knife block and kitchen knives was found against a wall surrounding the apartment complex. The knife used to stab Ibarra was not found.

At about 8:00 p.m. on the evening of the murder, Flores talked to Police Chief Chris Hughes. Flores told Chief Hughes he saw "two guys" by his car and he thought they were stealing things, and when he went downstairs, he saw Torres holding a stereo with wires. Flores told Chief Hughes that he thought Ibarra "kind of brought it on himself" for being a Southerner in that area. Flores identified appellant as the assailant and told Chief Hughes that the knife used in the attack had come from his apartment. He also said that they hid the knife block because he was scared and on parole.

Over five years later, John Maduena, who was an LNS gang member and in custody at the time, told jail deputies that he had information about a homicide in Lindsay. Maduena told detectives that appellant, who had just returned from Arizona, had admitted to stabbing "a paisa over there by the apartments." However, at trial, Maduena testified that detectives had "coached" him on what to say and "a lot of stuff was made up."

Based on a hypothetical question that tracked the facts in the case, the gang expert opined that the killing promoted and benefitted the gang by instilling fear in the rival gang so that it could keep control of its territory. The expert explained the use of force and fear made the gang stronger, which was another benefit to the gang.

The expert testified that the presence of other suspected gang members or associates at the killing would bolster his opinion that the crime promoted and benefitted

the gang. The expert explained that other gang members and associates could verify what occurred, and the presence of other gang members benefitted the gang by making the gang appear stronger, which assisted the gang in committing future crimes and recruiting members.

2015 Conspiracy to Commit Home Invasion Robberies (Counts 5–10)

Corporal Jeremy Rose and Officer Michael Szatmari testified that, due to an increase in gang violence in Tulare County in late 2014 and 2015, several law enforcement agencies conducted a joint wiretap investigation, named Operation Red Sol, into the activities of the Norteño criminal street gang. During the investigation, the wiretaps were narrowed to three target telephones, and personal surveillance of the individuals on the wiretaps.

The wiretaps and surveillance relevant to the crimes charged in this case occurred on August 24, and 25, 2019, and involved various high ranking Norteño gang members: Jose Martinez, Pedro Sanchez, brothers Emmanuel and Cervando Avalos (we refer, at times, to the brothers by their first names to avoid confusion), Luis Corona, Valentine Ornelas, Rigoberto Benavidez, Joe Hinojosa, and Pedro Lopez. Transcripts of the calls were given to the jurors. The text messages were read verbatim from the officer's reports.

The communications began on August 24, 2015, at 12:40 p.m., when Emmanuel called Hinojosa and told him they had a paying "job" for him, and he would be at the "pad" in 40 minutes to tell him about it. Emmanuel told Hinojosa he already had a couple of people but wanted to see if "you and Grinch [appellant] wanted to back him up." Hinojosa told Emmanuel he was not interested, but Emmanuel encouraged Hinojosa to call Grinch and see what he said.

A few minutes later, Sanchez called Lopez and asked if he was going to be in the Visalia area and had time "to hook up," as something "came up" and he wanted to "run it by [him]." Lopez said he would be heading that way soon.

Sanchez then sent a text to Cervando asking if he wanted to "mob, Visa" – "mob" typically refers to going somewhere to engage in criminal activity and "Visa" is short for Visalia.

At 3:07 p.m., Benavidez called Ornales and asked if they had "any homies" by "Pinkham." Ornales said that he did not think so. Benavidez said, "[T]hese fools are gonna f[**]kin' bust a move tonight" and need somewhere to get "suited." Benavidez then told Ornales he would talk to him soon about "details" and needed somewhere in the area to get dressed. Ornales said he did not know anyone in the area but would "look around." Benavidez told Ornales, "They're coming out of their jurisdiction," and after they "complete the mission, they're gonna give us a cut." Ornales said he would find a house.

At 3:21 p.m., Sanchez called Emmanuel and asked if he was ready and to tell Cervando to call a number he would text him to get "exact directions" and that "he's gonna be there right at seven."

Sanchez and Benavidez then exchanged a couple of text messages about setting up a meeting to discuss "a good lick [robbery] and a great opportunity."

Sanchez also sent Emmanuel a text that "it is come-up [easy score] and need to know ASAP if they are in or out" and that he had "a good job for Grinch and Hammer [Hinojosa]. They'll be a part of the team. I'll be at your pad in 40 minutes to explain the details," and he told Emmanuel to contact them. Emmanuel replied, "okay, got it."

Emmanuel forwarded his text message with Sanchez to Hinojosa and sent Hinojosa a text that said "get ahold of Grinch. See if he's in."

About 3:55p.m., officers conducting surveillance saw Emmanuel's white Ford Explorer parked in front of his house. Emmanuel, Cervando and Corona lived together in the same house on Samoa Street.

A short time later, Sanchez arrived at the house driving a black GMC Envoy. Almost immediately, a dark-colored Honda also arrived with four people. They all got out of their vehicles and talked.

At 4:33 p.m., Emmanuel called Corona and asked who he wanted to "take" with him. Corona said he was working on it, and Emmanuel told him Sanchez wanted the names "within an hour." At 4:41 p.m., Emmanuel sent a text message to Sanchez that Corona was "going for sure," and he would get the second body shortly. A minute later, when Corona told Emmanuel he could not find someone, Emmanuel said he would.

Various messages were sent back and forth stating Hinojosa and Corona were getting "haircuts." Emmanuel then sent a message to Sanchez asking whether "they" needed anything else "besides haircuts, long-sleeve black T[s]." At 5:18 p.m., Sanchez sent a message to Emmanuel that said, "handguns," and Emmanuel wrote back, "okay got it" and "both will have all black handguns."

At 6:03 p.m., Benavidez and Sanchez discussed an address "on Pinkham." Sanchez said he wanted the address so he "could have them wait … there, and know where to meet up …" and that they would "wait right there until they return and then we'll get our cut, and then everyone's gonna get their cut and then everyone's gonna take off." Around the same time, Emmanuel sent Sanchez a text asking what kind of shirts he wanted the "big guys to wear" or if a "uniform" would be provided. A later text said a uniform would be provided.

At 6:07 p.m., Benavidez sent Sanchez a text telling him to have "them" come to Pinkham Park and call when they get there, providing him with a phone number for "Jacob."

Ten minutes later, Sanchez sent Lopez a text with the phone number and said they would meet at "Jacob, the homies' pad," and Lopez replied that he would be there "at seven to meet the two workers."

At 6:21 p.m., Sanchez called Emmanuel wanting to know if they were ready and if Cervando was with him, and to go to the location "we were at earlier."

Sanchez also sent Benavidez a text asking for a police scanner and another text that said "everyone" would be there at 7:00 p.m.

At 6:30 p.m., four people got into the Nissan Altima parked at the house on Samoa Street and drove to Visalia. The Altima parked on Pinkham Street at 7:00 p.m. Benavidez drove up to his car and spoke to the people in the Altima, and the Altima then followed Benavidez to his apartment on South Encina Street in Visalia.

Various messages were sent back and forth as to who was where. Eventually, at 7:18 p.m., Benavidez called Sanchez and said he had taken "[t]he homies" to his apartment because the "neighbors" at "Jacob's pad" were "fishy." Lopez was informed and he arrived at Benavidez's apartment in a silver BMW.

At 7:35 p.m., Cervando called Sanchez, asking if they could use "the Nissan," as the "homies" could not "come through" with a car.

At 7:43 p.m., Hinojosa sent message to Emmanuel stating, "BS mission, Vato," but that "it's cool. We are still going to do it," and "Vatos ain't even prepared at all."

At 7:47 p.m., Cervando called Emmanuel and told him the "fools" "didn't come prepared at all," they did not have a car so they would have to take the Nissan and the guns they brought were without bullets. Emmanuel asked if he could tell Hinojosa and Corona to "take control" and that he was depending on Corona to "make this shit happen."

Cervando then called Sanchez and said they needed another car and that he had told Emmanuel that "nothing was prepared." Sanchez told Cervando to tell Emmanuel that they would reconvene the following evening at the same time and that they would get the vehicle and everything else in order.

At 8:11 p.m., Hinojosa sent a text to Emmanuel that "it looks kind of easy," but that there was "a cop who lives two houses down." Hinojosa assured Emmanuel that "we got this," and they would be "properly prepared."

At 9:02 p.m., Sanchez sent Benavidez a text that said it looked "like we're going to have to do it ourselves," because "the homie on the other end wasn't prepared like he mentioned." In another text, Sanchez said there was "no reason why we can't do it. I got the layout. We can shoot them a cut for the heads-up. What you think?" Benavidez replied, "I think we can handle it. The little homie just needs a few more heads." Sanchez replied that he had a "group" from Dinuba, and that it "[s]eems like it is worth the work. Good Payoff. I'll holler tomorrow."

The following day, August 25, 2015, the messages resumed. At 10:15 a.m., Lopez sent Sanchez a text that everything was "on track," and they were in the area "doing a bit more homework on the two job sites." Sanchez agreed they would give it "another try tonight."

Beginning at noon, there were phone calls attempting to recruit Ricardo Reyes, who said he had a "squad already." Sanchez told him it was "two pads" that involved "[s]quare people" who had "safes and guns and gold. Just bring bangers [guns]." Sanchez said the homes were "neighbors" and told him how many people lived in the houses. Sanchez said there was a "safe spot, close by" to meet up. Hinojosa sent Emmanuel a text message that the job was still on.

At 5:49 p.m., Sanchez sent Benavidez a text message telling him everyone was going to meet at 7:00 p.m. and Benavidez said he would be there.

A little before 6:30 p.m., Corona sent text messages to Christian Arroguin and asked if he was available for a "mission." Corona then sent Cervando a text message that he "got someone." "Several" people took black jackets and other objects out of the trunk of Corona's Cadillac and went into the house on Samoa Street.

At 7:24 p.m., Lopez sent Sanchez a message that he was on his way and Sanchez sent Benavidez a message that "they in the area." Around the same time, the Altima and a black Mustang left Samoa Street and drove to Benavidez's apartment in Visalia.

At 7:45 p.m., Cervando told Emmanuel they were going to go to Benavidez's apartment and use the Altima and "go to the pad and do it." Cervando told Emmanuel they needed another car "to bring all the stuff back." Cervando told Emmanuel they had "Grinch on the team," and all they needed was a "safe car to get back."

At 7:49 p.m., Emmanuel called Sanchez and told him he was going to meet Cervando at Benavidez's place, and they would use his "whip to bring everything back." Lopez's silver BMW arrived at Benavidez's apartment.

A few minutes later Hinojosa confirmed that they had left Lindsay and were "all strapped [firearms] and everything." Emmanuel told Hinojosa that he was taking part in the job and was going to use his car, but that he did not want to go "strapless" if the occupants "come out or something." Hinojosa told him, "It's an old guy and an old lady."

At 7:53 p.m., Lopez sent a message to Sanchez that they were at Benavidez's. Sanchez replied they were "around the corner."

A little before 8:00 p.m., a person came out of the apartments and drove away in Lopez's BMW. A few minutes later, the Explorer, Altima, and BMW arrived at the apartment. Emmanuel sent a text message to Sanchez saying, "[I]n motion. I'll update you soon."

At about the same time, the Altima and Explorer left the apartments, the Explorer behind the Altima, to prevent law enforcement from pulling the Altima. Officers in marked police cars attempted to stop the Altima at a red light, but the Altima sped away and led the officers on a high speed chase.

At 8:20 p.m., Emmanuel called Sanchez and Cervando called Benavidez to inform them that the Altima was leading the officers on a high speed chase and that "shots fired"

had been announced on the police radio. Emmanuel told Sanchez this looked like a set up and asked who was in "that whip." Emmanuel said Saldana, Hinojosa, Corona and "two homies" from "their hood." Emmanuel said he was with Cervando and "three homies."

The Altima eventually crashed, and appellant, Hinojosa, Corona, and Sergio Hernandez ran from the car. All were apprehended and all were wearing black clothing. Inside the vehicle and surrounding area, officers found five loaded firearms, including an AR-style rifle, black latex gloves, and three ski masks.

Based on a hypothetical that tracked the information gathered through Operation Red Sol, Corporal Rose opined that the criminal activity was in association with, at the direction of, and for the benefit of a criminal street gang. Rose explained that the criminal activity involved gang members working together and benefited the gang as a means of generating revenue. The criminal activity also promoted the gang as the conduct was violent, thereby bolstering the reputation of the gang. According to Rose, the violent conduct causes victims and witnesses to be uncooperative and tells rival gangs that the gang is willing to do anything for their own personal gain.

2016 Attempted Murder of Christopher Martinez in Jail (Counts 2–4)

In July of 2016, Christopher Martinez was housed in a unit of the Bob Wiley Detention Facility where Hispanic Northern gang members are housed. According to Martinez, he beat up his cellmate, Christopher Gomez, which was a violation of gang rules. After the fight, Martinez turned in an "incident report" to inform the other gang members about what happened. In return, the gang disciplined him by watching him and keeping him "separate from the rest of [his] program."

Sometime later, Martinez was "broadsided" by "at least four people," including appellant and Gomez, as Martinez was coming out of the shower. He ended up on the ground, unable to protect himself, and was stabbed "a couple of times." At some point he lost consciousness. These facts were born out by a video of the attack which was shown

to the jury. By the time correctional officer Russell Murphey arrived, Martinez was covered in blood, there was blood spatter on the wall, and a large pool of blood on the floor.

Martinez was in the hospital for at least a week and received stitches for cuts above both eyebrows, his forehead, and the back of his head. He had a perforated lung and multiple stab wounds on the side of his arm and legs. One of his teeth was knocked out. Martinez testified that he expected to receive some discipline for his fight with Gomez, but this was not "normal" discipline.

Correctional Officer Murphey testified that Northern gang members have rules dictating how they act, speak, and treat each other. The officer explained that the "shot caller" would "typically" decide whether someone was to be disciplined and removed from the gang. Disciplines can range from writing an essay to having longer and more difficult workouts. A removal involved several gang members assaulting a person and can involve the use of weapons.

Correctional Officer Murphey opined that Martinez, appellant, Gomez, Ramos and Lopez were either active Northern or Norteño gang members at the time of the attack. Based on a hypothetical that tracked the assault, the officer opined that the attack promoted or benefited the gang because removing the individual would "show that his actions toward another active gang members would not be tolerated." The attack also taught other gang members that there are rules Norteños must follow.

DISCUSSION

I. Consolidation of Charges

As previously noted, appellant was charged in three separate cases that were consolidated for trial. He now contends the trial court abused its discretion by consolidating the cases because the crimes were unrelated and there was very little cross-over evidence; there was a possibility that evidence of the separate incidents would have a spill-over effect and prejudice the jurors' ability to consider the charges separately; and

that Judge Paden, who presided over the pretrial, was biased against him by prejudging the motion to consolidate and ignoring the possible resultant prejudice. He further contends that, even if the cases were properly consolidated, the judgment should be reversed because consolidating his cases resulted in "gross unfairness" that deprived him of his right to due process. We find no error and no denial of a fair trial.

Background

In May of 2016, appellant was charged with the July 2008 murder, with gang and firearm enhancements. In July of 2016, appellant and codefendant, Pedro Lopez, Jr., were charged with the August 2015 conspiracy to commit home invasion robbery, attempted home invasion robbery, possession of ammunition, and gang enhancements alleged. And in December of 2016, appellant and codefendants, Christopher Gomez and Jonathan Ramos, were charged in the July 2016 attempted murder, plus personal use of a deadly weapon, infliction of great bodily injury and gang enhancements. In each case, appellant was represented by different counsel.

On December 28, 2016, appellant appeared before Judge Gary L. Paden. Appellant's counsel, Michelle Wallis, informed the court that appellant had three cases, and she represented him only on the current case. Counsel informed the trial court that she was hoping for a "global offer, but that isn't happening." Judge Paden asked, "Why don't we try all three of his cases at the same time?" When told one of the cases involved a homicide that was committed in Porterville, Judge Paden told the parties to "bring it over here," and consolidate "all his murder cases." Counsel clarified that not all the cases were murder cases and one involved the "Red Sol" investigation. The prosecutor expressed favor in consolidating the cases and Judge Paden told the prosecutor to "[f]ile a motion. I'll consolidate them." When counsel argued that it was inappropriate to consolidate the crimes as they were "totally separate and unrelated," Judge Paden responded that the cases involved the "[s]ame class of crime. I'm not gonna give this guy three trials."

At the end of the hearing, Judge Paden told the prosecutor to "file a motion to consolidate." When counsel informed Judge Paden that there was "no time waiver on the homicide trial," Judge Paden responded that that case was not before him, and "[s]eems like a good way to circumvent the consolidation, though, is simply going to trial on the homicide in Porterville."

The prosecutor filed a motion January 10, 2107, to consolidate appellant's three cases on the grounds that the charged crimes were the same class of crimes and consolidation would promote judicial economy. The motion stated that the People intended to present evidence that the crimes were gang-related and evidence of appellant's involvement in the gang. The motion provided a brief factual summary of the charged crimes.

Attorney Eric Hamilton, who represented appellant in the July 2008 murder, filed an opposition to the motion to consolidate, arguing there was no cross-admissible evidence, and that consolidating the cases would "inflame the jury" and prejudice appellant based on the circumstances of the murder and his incarceration at the time of the jail attack. Counsel also argued consolidation would create an undue consumption of time and confuse the jurors.

Attorney Melissa Sahatjian, who represented appellant on the August 2015 conspiracy crimes, filed an opposition to consolidation, arguing that consolidation would amount to "an incredible risk of prejudice" to appellant. She also argued the cases were not connected in their commission, involved different witnesses, and that conspiracy to commit robbery was not in the same class of crimes as the other cases. She also argued the cumulative effect would "inflame the jury" and prejudice appellant based on a spill-over of evidence.

Attorney Wallis, who represented appellant in the July 2016 attempted murder, filed a motion in opposition to consolidate, arguing that joinder was "improper, highly prejudicial," "unfair," and would interfere in the defenses presented in each case.

At the hearing held January 25, 2017, Judge Paden stated that he had read the motion to consolidate and the three motions in opposition, and that his "tentative ruling" was to grant the motion to consolidate.[4] He explained that all three cases were gang-related, much of the information would be admissible in all the cases, all the crimes were of the same class, and that he did not find, pursuant to Evidence Code section 352, that doing so would be more prejudicial than probative.

Attorney Hamilton argued that judicial economy was not a valid reason to consolidate, estimating that the murder case would take less than five days, the attempted jail murder a day or two, and the conspiracy case not more than a week. He also argued keeping the cases separate would place less of a burden on the jurors, the prejudice from the gang allegations was "substantial," and each substantive crime involved different witnesses. He acknowledged that the crimes were of the "same class," but that the cross-admissibility of evidence related only to the "special allegations."

While Judge Paden stated that he would advise the selected jury to "judge each case on its own merits," Attorney Hamilton responded that such admonishments are merely a suggestion and jurors are "gonna do whatever they want."

Attorney Wallis's primary argument was that consolidation would permit the prosecutor to "bootstrap these three cases together," and would hamper appellant's ability to put on a defense.

Attorney Sahatjian joined Attorneys Hamilton and Wallis's argument and also urged the trial court to consider the likelihood that the charges would "inflame" the jury against appellant, noting the three crimes were "very serious events" that occurred over a span of eight years.

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[4] There are two augmented reporter's transcripts – one for the December 28, 2016, hearing, and one for the January 25, 2017, hearing.

The prosecutor noted that appellant's attorneys did not appear to argue that the cases did not involve the same class of crimes. He also argued that the cross-admissibility of gang evidence in each case supported consolidation for judicial economy.

Following argument, Judge Paden granted the motion to consolidate.

Asserted Judicial Bias

We first address appellant's claim that Judge Paden's remarks regarding consolidation revealed a prejudgment on the merits of the motion that was based, in part, on a prejudgment of appellant's guilt of the charges. Appellant never objected on this basis, or moved to disqualify Judge Paden for bias, at any time during the pretrial proceedings over which he presided. Accordingly, we agree with respondent that this claim is forfeited.

A defendant may not go to trial before a judge and gamble on a favorable result, and then assert for the first time on appeal that the judge was biased. (*People v. Farley* (2009) 46 Cal.4th 1053, 1110; *People v. Chatman* (2006) 38 Cal.4th 344, 362–363; see *People v. Rogers* (1978) 21 Cal.3d 542, 548 ["The contrary rule would … 'permit the defendant to gamble on an acquittal at his trial secure in the knowledge that a conviction would be reversed on appeal' "].) Moreover, as will be discussed below, the contention lacks merit, as we find no abuse of discretion in Judge Paden's ruling on the consolidation motion.

Section 954

Section 954 discusses the consolidation of accusatory pleadings. It provides in relevant part:

> "An accusatory pleading may charge two or more different offenses connected together in their commission; or different statements of the same offense or two or more different offenses of the same class of crimes or offenses, under separate counts, and if two or more accusatory pleadings are filed in such cases in the same court, the court may order them to be consolidated … provided, that the court in which a case is triable, in the interests of justice and for good cause shown, may in its discretion order that the different offenses or counts set forth in the accusatory pleading be

> tried separately or divided into two or more groups and each of said groups tried separately. An acquittal of one or more counts shall not be deemed an acquittal of any other count."

" 'Offenses of the same class are offenses which possess common characteristics or attributes.' [Citations.]" (*People v. Landry* (2016) 2 Cal.5th 52, 76.) All assaultive crimes against the person are considered to be of the same class. (*People v. Walker* (1988) 47 Cal.3d 605, 622.) Offenses are connected together in their commission when they share a common element of substantial importance, even though they do not relate to the same transaction and were committed at different times and places against different victims. (*People v. Landry, supra,* 2 Cal.5th at p. 76; *People v. Leney* (1989) 213 Cal.App.3d 265, 269.) "[T]he intent or motivation with which different acts are committed can qualify as a 'common element of substantial importance' in their commission and establish that such crimes were 'connected together in their commission.' [Citation.]" (*Alcala v. Superior Court* (2008) 43 Cal.4th 1205, 1219.)

Joinder of the offenses with which appellant was charged in all three cases was statutorily permissible, because all were of the same class, connected together in their commission, or both. (See *People v. Landry, supra,* 2 Cal.5th at pp. 76–77.)

Appellant does not appear to dispute murder, attempted murder, and home invasion robbery belong to the same class of crimes as they "share common characteristics as assaultive crimes against the person. [Citations.]" (*People v. Lucky* (1988) 45 Cal.3d 259, 276.) Furthermore, all three crimes involved a " ' "common element of substantial importance" ' " in that all three were committed for the benefit of a criminal street gang. (*Ibid.*) In addition, the law favors the joinder of counts because it promotes efficiency. (*People v. Merriman* (2014) 60 Cal.4th 1, 37.)

Even if consolidation of counts is authorized under section 954, courts still "must always examine consolidation motions for their potentially prejudicial effect …." (*People v. Lucky, supra,* 45 Cal.3d at p. 277.) "Prejudice may arise from consolidation where it allows the jury to hear inflammatory evidence of unrelated offenses which

would not have been cross-admissible in separate trials." (*Ibid.*) Where the statutory requirements for joinder are met, a defendant must make a " 'clear showing of prejudice' " to establish that the trial court abused its discretion. (*People v. Simon* (2016) 1 Cal.5th 98, 122–123; see *People v. Merriman, supra,* 60 Cal.4th at p. 37.)

In determining whether there was an abuse of discretion, we examine the record before the trial court at the time of its ruling. (*People v. Price* (1991) 1 Cal.4th 324, 388.) In evaluating whether the trial court abused its discretion, we consider: "(1) whether the evidence relating to the various charges would be cross-admissible in separate trials, (2) whether any of the charges are unusually likely to inflame the jury against the defendant, (3) whether a weak case has been joined with a strong case or with another weak case, and (4) whether one of the charges is a capital offense or the joinder of the charges converts the matter into a capital case. [Citation.]" (*People v. Simon, supra,* 1 Cal.5th at p. 123.) "A court abuses its discretion when its ruling 'falls outside the bounds of reason.' [Citation.]" (*People v. Osband* (1996) 13 Cal.4th 622, 666; accord *People v. Soper* (2009) 45 Cal.4th 759, 774.)

Cross-Admissibility of Evidence

We first consider the issue of cross-admissibility. Appellant argues there was no showing at the time Judge Paden made his ruling that the evidence in the three cases would have been cross-admissible because "[t]he prosecutor offered no analysis whatsoever to assert cross-admissibility under [Evidence Code] section 1101, subdivision (b)."

"If the evidence underlying the charges in question would be cross-admissible, that factor alone is normally sufficient to dispel any suggestion of prejudice and to justify a trial court's refusal to sever properly joined charges. [Citation.]" (*People v. Soper, supra,* 45 Cal.4th at pp. 774–775; accord *Alcala v. Superior Court, supra,* 43 Cal.4th at p. 1221; *People v. Jenkins* (2000) 22 Cal.4th 900, 948.) " '[T]he issue of cross-admissibility "is not cross-admissibility of the charged offenses but rather the

admissibility of relevant evidence" that tends to prove a disputed fact. [Citations.]' [Citation.] Thus, … ' "complete (or so-called two-way) cross-admissibility is not required. In other words, it may be sufficient, for example, if evidence underlying charge 'B' is admissible in the trial of charge 'A' – even though evidence underlying charge 'A' may not be similarly admissible in the trial of charge 'B.' " ' [Citation.]" (*People v. Capistrano* (2014) 59 Cal.4th 830, 849, overruled on another ground in *People v. Hardy* (2018) 5 Cal.5th 56, 104.)

"Whether the evidence of other crimes would have been admissible in separate trials on the others is governed by Evidence Code section 1101, subdivision (b), which permits admission of other uncharged acts when offered as evidence of a defendant's motive, common scheme or plan, preparation, intent, knowledge, identity, or absence of mistake or accident in the charged crimes." (*People v. Lucas* (2014) 60 Cal.4th 153, 214–215, disapproved on another ground in *People v. Romero and Self* (2015) 62 Cal.4th 1, 53–54, fn. 19.) "In order to be admissible to prove intent, the uncharged misconduct must be sufficiently similar to support the inference that the defendant ' "probably harbor[ed] the same intent in each instance." [Citations.]' [Citation.]" (*People v. Ewoldt* (1994) 7 Cal.4th 380, 402.) "To establish the existence of a common design or plan, the common features must indicate the existence of a plan rather than a series of similar spontaneous acts, but the plan thus revealed need not be distinctive or unusual." (*Id.* at p. 403.) "The greatest degree of similarity is required for evidence of uncharged misconduct to be relevant to prove identity. For identity to be established, the uncharged misconduct and the charged offense must share common features that are sufficiently distinctive so as to support the inference that the same person committed both acts. [Citation.] 'The pattern and characteristics of the crimes must be so unusual and distinctive as to be like a signature.' [Citation.]" (*Ibid.*) Similarity of offenses is not required to establish the motive theory of relevance. (*People v. Thompson* (2016) 1 Cal.5th 1043, 1115.)

The gang evidence – both in general and as it specifically related to each case – would have been cross-admissible in all three cases to show motive, intent, and knowledge, and, as between the murder and attempted murder cases, common scheme or plan. (*People v. Valdez* (2012) 55 Cal.4th 82, 130–131; and see *People v. McKinnon* (2011) 52 Cal.4th 610, 655–656 [gang evidence properly admitted to show motive; although, even where relevant, gang evidence may have highly inflammatory impact on jury, probative value of motive generally exceeds prejudicial effect].)

However, "[w]hile the presence of [cross-admissible] evidence ' "is normally sufficient to dispel any suggestion of prejudice and to justify a trial court's refusal to sever properly joined charges" ' [citation], the absence of cross-admissible evidence does not bar joinder." (*People v. O'Malley* (2016) 62 Cal.4th 944, 968.)

Potential Prejudice from Joinder

Assuming arguendo that the evidence underlying the joined charges would *not* be cross-admissible, we proceed to consider " 'whether the benefits of joinder were sufficiently substantial to outweigh the possible "spill-over" effect of the"'other-crime"' evidence on the jury in its consideration of the evidence of defendant's guilt of each set of offenses.' [Citations.]" (*People v. Soper, supra,* 45 Cal.4th at p. 775.) In making that assessment, we consider three additional factors, any of which – combined with our earlier determination of absence of cross-admissibility – might establish an abuse of the trial court's discretion: (1) whether some of the charges are particularly likely to inflame the jury against the defendant; (2) whether a weak case has been joined with a strong case or another weak case so that the totality of the evidence may alter the outcome as to some or all of the charges; or (3) whether one of the charges (but not another) is a capital offense, or the joinder of the charges converts the matter into a capital case. (*Ibid.*)

Here, appellant argues the charges together are particularly likely to inflame and prejudice the jury against him and the jury would fail to consider the evidence of each of his crimes separately. But to do so, appellant must show "an 'extreme disparity' in the

strength or inflammatory character of the evidence. [Citation.]" (*People v. Ybarra* (2016) 245 Cal.App.4th 1420, 1436.) The information Judge Paden had at the time of the ruling – from the prosecutor's motion to consolidate and appellant's oppositions – shows no such disparity.

In the case of the July 2008 murder, it was alleged that appellant called the victim a "Scrap," a derogatory term for the rival gang of the Norteños, and eyewitnesses saw appellant strangle and stab the victim. In the August 2015 conspiracy to commit home invasion robbery, appellant was referred to in intercepted telephone calls and text messages as someone who wanted to participate in the home invasion robbery. Appellant was subsequently in the car officers attempted to stop as it was driving towards the neighborhood where the robbery was to take place. Following a car chase, appellant was one of the occupants of the vehicle apprehended, along with guns, ammunition, gloves and ski masks. And in the July 2016 attempted murder in jail, appellant was one of four inmates in a unit designated for Norteño gang members who participated in a coordinated attack on the victim.

There was sufficient information before Judge Paden to show equal strength of evidence against appellant in all three cases, and it cannot be said that one act was more or less inflammatory than the other. As the California Supreme Court has stated: "[A]s between any two charges, it always is possible to point to individual aspects of one case and argue that one is stronger than the other. A mere imbalance in the evidence, however, will not indicate a risk of prejudicial 'spillover effect,' militating against the benefits of joinder and warranting severance of properly joined charges. [Citation.] Furthermore, the benefits of joinder are not outweighed – and severance is not required – merely because properly joined charges might make it more difficult for a defendant to avoid conviction compared with his or her chances were the charges to be separately tried. [Citations.]" (*People v. Soper, supra,* 45 Cal.4th at p. 781.)

Appellant has failed to show that Judge Paden abused his discretion in consolidating the three cases. (*People v. Soper, supra,* 45 Cal.4th at p. 783.) Nor has appellant shown that the consolidation resulted in a trial that violated his right to due process, as we discuss next.

Due Process

Even if a trial court's ruling was proper at the time it was made, the reviewing court "must still determine whether the joinder of charges resulted in ' " gross unfairness depriving the defendant of due process of law." ' [Citation.]" (*People v. Trujeque* (2015) 61 Cal.4th 227, 259.) To establish gross unfairness amounting to a due process violation, a defendant must show there was a " 'reasonable probability' that the joinder affected the jury's verdicts. [Citations.]" (*People v. Ybarra, supra,* 245 Cal.App.4th at p. 1438.)

The evidence which related to each case, as detailed earlier, was distinct and independently strong to support appellant's convictions, and appellant does not challenge the sufficiency of the evidence. Appellant points to two examples in the prosecutor's closing remarks that he contends shows the prosecutor sought guilty verdicts by "drawing comparisons with the other criminal episodes." However, it is reasonable to assume that the jurors understood the prosecutor's closing remarks as attempting to persuade the jury to find appellant guilty of all charges, not guilty based merely on the strength of evidence in some but not other charges. In fact, the prosecutor, in closing, specifically stated that there were "three different incidents that happened, the murder, the attempted murder, in jail, and we have the wiretap stuff. And all three of those are separate incidents."

The trial court also instructed the jury, pursuant to CALCRIM No. 3515, that it must "consider each count separately and return a separate verdict for each one." We note the jury found appellant guilty of the lesser offense in count 1 of second degree murder, as opposed to the allegation that he committed first degree murder. This demonstrates jurors were capable of, and did, differentiate among the various charges, allegations, and evidence. (See *People v. Jones* (2013) 57 Cal.4th 899, 927.) It further

demonstrates jurors did not impermissibly cumulate evidence or assume that, because of the evidence on certain charges, appellant was guilty of all charges.

We find no abuse of discretion on the part of the trial court in consolidating the three cases and appellant has not satisfied his burden of showing that consolidating the three cases resulted in gross unfairness that deprived him of his right to due process of law.

II. Ineffective Assistance of Counsel

Appellant was charged in counts 5 through 10 with events that occurred on August 24 and 25, 2015, conspiracy to commit home invasion robbery, attempted robbery, as well as possession of a firearm and ammunition. While appellant acknowledges there is solid supported evidence of his possession of a firearm and ammunition when he was arrested, coupled with proof of his prior felony conviction for firearm offenses (counts 9 and 10), he argues the prosecutor relied extensively on evidence of hearsay text messages and intercepted telephone conversations between alleged coconspirators to prove appellant's guilt on the alleged conspiracy and attempted robbery offenses, and trial counsel was prejudicially ineffective for failing to move to strike the improperly admitted coconspirator hearsay evidence. He also alleged trial counsel was ineffective for failing to request amplification on a corresponding jury instruction and in closing argument when addressing the home invasions charges, and that the convictions in counts 5, 6, and 8 must be reversed.[5] We find no ineffective assistance of counsel.

Background

In its trial brief with motions in limine, the prosecution sought the trial court's ruling allowing admission of hearsay under the coconspirator exception, Evidence Code section 1223, to be introduced prior to establishing the existence of a conspiracy. The defense filed motions in limine urging the trial court to exclude coconspirator statements

[5] Count 7 was dismissed as duplicative.

on grounds that there was no evidence independent of the hearsay statements to sustain a prima facie demonstration of a conspiracy to commit home invasion robberies. Acknowledging the discretion of the trial court to alter the order of proof, trial counsel objected to the introduction of hearsay statements of alleged coconspirators prior to proof establishing the existence of the alleged conspiracy and appellant's participation therein.

When the trial court asked trial counsel if there were "any statements" he was aware of that he would be objecting to, counsel stated it was "hard to say until [he] hear[d] specifically which ones." Counsel said he could go through the grand jury indictment, but that there were a lot of "things" that were not "really relevant to anything except getting along, getting haircuts or something." The trial court asked counsel if there was some way to "pinpoint and identify certain statements," but counsel did not identify any.

The trial court, wishing to avoid a lengthy section 402 hearing and in the interests of judicial economy, granted the People's motion, subject to a motion to strike should the foundation not be laid.

At the close of the case in chief, trial counsel did not move to strike the conspirator hearsay evidence, but instead asked the trial court to set aside the charges in, as applicable here, counts 5 and 7. The trial court granted the motion to set aside count 7.

The trial court instructed the jury, without objection, with CALCRIM No. 418, as required on the use of a coconspirator's statement to incriminate a defendant if the statement has been admitted under Evidence Code section 1223.

Ineffective Assistance of Counsel

Hearsay Statements

" 'Hearsay evidence' is evidence of a statement that was made other than by a witness while testifying at the hearing that is offered to prove the truth of the matter stated." (Evid. Code, § 1200.) Hearsay is generally inadmissible unless it fails under an exception (Evid. Code, § 1200, subd. (b)), such as the coconspirator hearsay exception,

Evidence Code section 1223. That exception states, "Evidence of a statement offered against a party is not made inadmissible by the hearsay rule if: (a) The statement was made by the declarant while participating in a conspiracy to commit a crime or civil wrong and in furtherance of the objective of that conspiracy; (b) The statement was made prior to or during the time that the party was participating in that conspiracy; and (c) The evidence is offered either after admission of evidence sufficient to sustain a finding of the facts specified in subdivisions (a) and (b) or, in the court's discretion as to the order of proof, subject to the admission of such evidence."

"A conspiracy is an agreement between two or more persons, with specific intent, to achieve an unlawful objective, coupled with an overt act by one of the conspirators to further the conspiracy. [Citation.]" (*People v Gann* (2011) 193 Cal.App.4th 994, 1005.) The existence of a conspiracy must be established independently of the statement of the coconspirator. (*People v. Leach* (1975) 15 Cal.3d 419, 423–424; *People v. Jeffrey* (1995) 37 Cal.App.4th 209, 215.) "This fact need not be established beyond a reasonable doubt, or even by a preponderance of the evidence. [Citation.] The conspiracy may be shown by circumstantial evidence and 'the agreement may be inferred from the conduct of the defendants mutually carrying out a common purpose in violation of a penal statute.' [Citations.]" (*People v. Olivencia* (1988) 204 Cal.App.3d 1391, 1402–1403.) The court's discretion as to the order of proof, as enunciated in section 1223, subdivision (c), makes the putative requirement of an advance showing of the preliminary facts in effect a requirement of an independent showing, since the change in the order of proof is more generally the rule than the exception. (*People v. Leach, supra,* 15 Cal.3d at p. 432, fn. 10.)

At trial, the prosecution presented evidence of telephone calls and text messages between Norteño gang members that occurred over two days to prove the existence of a conspiracy to commit home invasion robberies. On appeal, appellant argues that trial

counsel was ineffective for failing to strike the recorded statements as inadmissible coconspirator hearsay evidence.

As noted above, Evidence Code section 1223 permits evidence of a statement made while participating in a conspiracy, in furtherance of the conspiracy's objective, so long as the statement was made before or during the conspiracy and a proper foundation of the underlying conspiracy is made. On appeal, appellant does not specify which statements he is referring to when challenging trial counsel's decision not to object to such statements. An appellate court is "not required to search the record to ascertain whether it contains support [for the appellant's] contentions. [Citations.]" (*Mansell v. Board of Administration* (1994) 30 Cal.App.4th 539, 545.) In any event, we find no merit to appellant's claim of ineffective assistance of counsel

"[T]o establish a claim of ineffective assistance of counsel, defendant bears the burden of demonstrating, first, that counsel's performance was deficient because it 'fell below an objective standard of reasonableness … under prevailing professional norms.' [Citations.]" (*People v. Ledesma* (2006) 39 Cal.4th 641, 745–746.)

Here, trial counsel was not ineffective for failing to make a motion to strike the coconspirators' hearsay statements because the prosecution presented the following evidence to establish prima facie existence of a conspiracy to commit home invasion robbery from the surveillance observations and events surrounding appellant's arrest, independent of any alleged hearsay statements by appellant's coconspirators.

On the afternoon of August 24, 2015, Sanchez, the regiment commander for the Tulare County Norteños, arrived at the Samoa Street house where Emmanuel, Cervando, and Corona lived. Emmanuel was the southern district leader; Cervando later took over as the southern district leader; and Corona was a squad leader. Immediately after Sanchez arrived, another car arrived at the house occupied by four people, who got out of the car, spoke to Sanchez and then Sanchez left.

Less than an hour later, four people got into a Nissan Altima parked at the Samoa Street house and drove to a barber shop in Lindsay, which was closed. The Altima then made a few more stops before driving back to Samoa Street house. At 6:30 p.m., four people got into the Altima and drove to Visalia, where they met Benavidez on Pinkham Street. Benavidez was an "influential" Norteño gang member being groomed for a regiment commander position. The two cars then drove to Benavidez's apartment in Visalia.

Around 7:50 p.m., a silver BMW associated with Lopez, the regiment commander for the Fresno County Norteños, left Benavidez's apartment and returned 10 minutes later. About 20 minutes later, several people got into the BMW and drove to Pinkham Street. The car drove slowly through the neighborhood and then back to Benavidez's apartment.

The following day, August 25, 2016, at 5:46 p.m., Corona and another individual drove away in his Cadillac. When Corona returned to the house, several people came outside and took black jackets and other objects inside.

Around 7:20 p.m., four people got into the Altima and drove to Benavidez's apartment in Visalia. Less than an hour later, Emmanuel's Explorer, the Altima, and BMW arrived at Benavidez's apartment within minutes of each other.

Close to 8:30 p.m., the Altima and Explorer left the apartment complex, the Explorer driving directly behind the Altima as a "blocking vehicle" to prevent law enforcement from pulling over the Altima. When officers attempted a traffic stop on the Altima, the vehicle sped away and led the officers on a high speed chase.

The Altima eventually crashed and five people, all wearing dark clothing, ran from the vehicle, including appellant, Lopez, Hinojosa, and Corona. Officers searched the Altima and surrounding area and found five loaded guns, including an AR-style assault rifle, three ski masks, and latex gloves.

Emmanuel and Cervando were standing by the Explorer not far from where the pursuit ended. They got back into the Explorer and drove to Benavidez's apartment.

Officer Szatmari testified that it was believed, based on the intercepted communications and surveillance, that the homes targeted for the robberies were on Pinkham Street.

There was sufficient independent evidence from which a reasonable trier of fact could find it more likely than not that a conspiracy to commit home invasion robbery existed when the coconspirators' made any hearsay statements. (See *People v. Herrera* (2000) 83 Cal.App.4th 46, 63.) Failing to object did not fall below an objective standard of reasonableness as trial counsel has no duty to argue a meritless claim. Appellant has not shown he received ineffective assistance of counsel. (*People v. Reynolds* (2010) 181 Cal.App.4th 1402, 1409.)

Jury Instruction

When a coconspirator's statement that would otherwise be hearsay is admitted into evidence pursuant to the exception set forth in Evidence Code section 1223, the trial court has a sua sponte duty to instruct the jury pursuant to CALCRIM No. 418. (Bench Notes to CALCRIM No. 418 [reciting that the instructional duty is sua sponte]; see also *People v. Jeffery*, *supra*, 37 Cal.App.4th at p. 215.) CALCRIM No. 418, as given here without objection, provided, in relevant part:

> "In deciding whether the People have proved that the defendant committed the crime charged, you may not consider any statement made out of court by Pedro Sanchez, Pedro Lopez, Valentine Ornelas, Rigoberto Benavides, Emanuel Avalos, Cervando Avalos, Luis Corona, Juan Hinojosa, or Ricard Reyes unless the People have proved by a preponderance of the evidence that:
>
> "Number one, some evidence other than the statement itself establishes that a conspiracy to commit a crime existed when the statement was made.
>
> "Those conspirators who I mentioned, were members of and participating in the conspiracy when they made the statement;

"Those individuals made the statement in order to further the goal of the conspiracy;

"And four, the statement was made before or during the time that the defendant was participating in the conspiracy."

Appellant argues trial counsel was ineffective for failing to ask the trial court to amplify CALCRIM No. 418 because the instruction "required only [that] the jury find proof of the existence of a 'conspiracy to commit *a crime*' independent of the statements in order to consider the statements as proof 'the defendants committed *the crime charged*,' i.e., conspiracy to commit home invasion robbery." As argued by appellant, the pattern instruction "would be better formed and serve the ends of justice with the addition of a 'fill in the blank' to insert the object of the criminal conspiracy."

The record does not reveal why trial counsel did not ask for an amplification of the instruction, but the instruction as written is a correct statement of the law and trial counsel could have reasonably concluded that the standard instruction was adequate.

Furthermore, CALCRIM No. 415, which was given immediately prior to CALCRIM No. 418, expressly stated that appellant was charged with "conspiracy to commit home invasion robbery at Locations 1 and 2", a phrase that repeated numerous times during the instruction. The instruction further told jurors that, to find appellant guilty of conspiracy to commit home invasion robbery, the prosecution must prove that appellant, or "Pedro Sanchez, Pedro Lopez, Valentine Ornelas, Emmanuel Avalos, Cervando Avalos, Rigoberto Benavides, Luis Corona, Juan Hinojosa, or Ricardo Reyes" "or all of them" committed at least one of the specified overt acts to accomplish the home invasion robbery.

And immediately following CALCRIM No. 418, the jury was instructed, pursuant to CALCRIM No. 419, that appellant "is not responsible for any acts that were done before he joined the conspiracy," that evidence of acts or statements made before appellant joined the conspiracy could only be considered "to show the nature and goals of

the conspiracy," and that the jury was not to consider any such evidence to prove appellant was "guilty of any crimes committed before he joined the conspiracy."

Jurors are presumed to be intelligent and capable of understanding and correlating all jury instructions given. (*People v. O'Malley, supra,* 62 Cal.4th at p. 991.) Read together, these instructions made clear that the object of the conspiracy was home invasion robbery, and that "conspiracy to commit a crime" in CALCRIM No. 418 referred to home invasion robbery. " ' "Instructions should be interpreted, if possible, so as to support the judgment rather than defeat it if they are reasonably susceptible to such interpretation" [Citation.]' [Citation.]" (*People v. Spaccia* (2017) 12 Cal.App.5th 1278, 1287.)

Given the state of the evidence and the instructions given, there is no reasonable probability appellant would have received a more favorable verdict on counts 5, 6, and 8 if CALCRIM No. 418 had been amplified as appellant suggests. Appellant has not shown trial counsel was ineffective for failing to make this request.

Closing Argument

In addressing the conspiracy charges in closing, trial counsel urged the jury to find reasonable doubt based on a lack of evidence of when appellant joined the crew in the car, lack of proof of when and how he might have been recruited, lack of any of his statements in the intercepted communications, and urged the jurors to scrutinize whether appellant had any knowledge of the home invasion robbery operation.

Appellant contends trial counsel was ineffective because his argument was defective as it "necessarily endorsed" the notion that the coconspirators statements should be considered and trial counsel failed to enlighten the jury on the requirement of independent evidence to establish a conspiracy to commit home invasion robbery, withdrawing a potentially meritorious defense.

"The right to effective assistance of counsel extends to closing arguments. [Citations.] Nonetheless, counsel has wide latitude in deciding how best to represent a

client, and deference to counsel's tactical decisions in his closing presentation is particularly important because of the broad range of legitimate defense strategy at that stage. Closing argument should 'sharpen and clarify the issues for resolution by the trier of fact' [citation], but which issues to sharpen and how best to clarify them are questions with many reasonable answers." (*Yarborough v. Gentry* (2003) 540 U.S. 1, 5–6.) The decision of how to argue to the jury after the presentation of evidence is inherently tactical and "rarely demonstrates incompetence" (*People v. Freeman* (1994) 8 Cal.4th 450, 498), and our judicial review of a defense attorney's summation is "highly deferential" (*Yarborough v. Gentry, supra,* at p. 6.)

Trial counsel's decision here to try and create reasonable doubt by highlighting certain aspects of the prosecution's case, and not to focus on the coconspirators' statements was a matter of trial tactics and strategy that we do not " 'second-guess.' " (*People v. Williams* (1997) 16 Cal.4th 153, 219.) Furthermore, because there was evidence, independent of the coconspirators' hearsay statements, to establish a prima facie existence of a conspiracy to commit home invasion robbery, appellant has not shown there is a reasonable probability he would have obtained a more favorable verdict had trial counsel made the argument he now urges.

III. Sufficient Evidence to Support Gang Enhancement on Murder Conviction

Appellant finally contends the jury's finding on the gang allegation on count 1 must be reversed because there was insufficient evidence that LNS gang members had engaged in a pattern of criminal gang activity before the murder of Ibarra, the victim in count 1. We disagree.

Standard of Review

"When we review a challenge to the sufficiency of the evidence to support a conviction we apply the substantial evidence standard. Under that standard the reviewing court examines the entire record to determine whether or not there is substantial evidence from which a reasonable jury could find beyond a reasonable doubt that the crime has

been committed. In reviewing that evidence, the appellate court does not make credibility determinations and draws all reasonable inferences in favor of the trial court's decision. We do not weigh the evidence but rather ask whether there is sufficient reasonable credible evidence of solid value that would support the conviction. (*People v. Johnson* (1980) 26 Cal.3d 557, 576–578 ….)" (*People v. Russell* (2010) 187 Cal.App.4th 981, 987–988.) The jury's finding on enhancement allegations are reviewed under the same standard. (*People v. Rivera* (2019) 7 Cal.5th 306, 331.)

Predicate Offenses

The Legislature enacted the California Street Terrorism Enforcement and Prevention Act (STEP Act) expressly "to seek the eradication of criminal activity by street gangs." (§ 186.21.) One component of the statute is a sentence enhancement for felonies committed "for the benefit of, at the direction of, or in association with any criminal street gang, with the specific intent to promote, further, or assist in any criminal conduct by gang members." (§ 186.22, subd. (b)(1).) A "criminal street gang" is "any ongoing organization, association, or group of three or more persons, whether formal or informal, having as one of its primary activities the commission of one or more of the criminal acts enumerated in [§ 186.22, subd. (e)], having a common name or common identifying sign or symbol, and whose members individually or collectively engage in or have engaged in a pattern of criminal gang activity." (§ 186.22, subd. (f).) A "pattern of criminal gang activity" means the commission of, attempted commission of, or conviction of two or more of the enumerated offenses, referred to as "predicate offenses," provided at least one of these offenses occurred after the effective date of the STEP Act and the last of those offenses occurred within three years after a prior offense, and the offenses were committed on separate occasions, or by two or more person. (§ 186.22, subd. (e).)

To prove the predicate offenses by LNS gang members, the prosecutor presented evidence that Armando Flores had been convicted of first degree burglary, assault with

force likely to produce great bodily injury, dissuading a witness, plus a gang enhancement, based on conduct that occurred on or about August 16, 2004, and that Jesus Palos had been convicted of assault with a deadly weapon, plus a gang enhancement, based on conduct that occurred on or about March 13, 2005. Officer Moreno, the gang expert, testified that, in his opinion, Flores was a "gang member" and Palos an "LNS Norteño." Officer Moreno explained that, sometime around 1992, LNS and NSL merged as one gang and were "interchangeable."

Appellant argues there was insufficient evidence that Flores was an LNS gang member because Officer Moreno identified him only as a non-specified "gang member," not an LNS member. At trial, Corporal Rose was asked if Flores and Palos were "both from the same gang." Rose responded, "North Side Lindsay." The prosecutor then asked, "That was described by Detective Moreno?" Rose replied, "Yes."

Appellant argues, for the first time in his reply brief, that Corporal Rose's response was case-specific testimony in violation of *People v. Sanchez* (2016) 63 Cal.4th 665, because Rose based his answer on Officer Moreno's testimony that Flores was an NLS member, but that Moreno had never identified Flores as an NSL member. However, the very next question by the prosecutor – "About how they split apart and came back together?" – seems to indicate that Rose was not basing his opinion that Flores was an NLS member on Moreno's testimony, but on his own knowledge of Flores as an NLS member and he was instead responding on the lack of distinction between the NSL and LSN, as earlier testified to by Moreno.

Drawing all reasonable inferences in favor of the verdict, we find there is sufficient evidence that members of appellant's gang had engaged in a pattern of criminal activity before Ibarra's murder in 2008, and we reject appellant's claim to the contrary.

IV. Corrections to the Abstract of Judgment

In a footnote, respondent brings to this court's attention several mistakes in the abstract of judgment which need correcting. As pointed out by respondent, we note that

the abstract states that the sentence on count 3 was stayed pursuant to section 654, when the reporter's transcript indicates that the trial court ordered the sentence in count 3 to run consecutive to count 1. However, the minute order indicates that the sentence on count 3 is to run consecutive to count 1 and is stayed pursuant to section 654. The abstract also states that the sentence in count 2 is ordered to run consecutive to count 1 and the enhancements were imposed, when the trial transcript and minute order indicate that the sentence and enhancements were ordered to run constructive to count 1 and are stayed pursuant to section 654.

Respondent also states, without specificity, that "[t]here also appears to be mistakes in the abstract for the sentences imposed on counts 5, 8, 9, and 10." While the minute order appears to correspond with the abstract, the reporter's transcript is confusing, and it is not clear what mistakes respondent is identifying.

While this court can correct clerical errors in the abstract of judgment, we find it prudent in this situation, due to the conflicting records, to remand to the superior court to make the necessary corrections. (*People v. Mitchell* (2001) 26 Cal.4th 181, 187–188.)

DISPOSITION

The matter is remanded to the superior court to correct the abstract of judgment as necessary and forward to all appropriate parties a certified copy of an amended abstract of judgment. In all other respects, the judgment is affirmed.

POOCHIGIAN, J.

WE CONCUR:

LEVY, Acting P.J.

SNAUFFER, J.